instances, the probability of fraud is so greatly increased that the courts are justified in excluding such evidence from the jury altogether.[14]

ATTESTATION OF WILL BY WITNESSES WHEN TESTATORS' SIGNATURE IS CONCEALED.—Beginning with the Statute of Frauds various statutes have been enacted prescribing certain forms for the execution of wills in order to prevent fraud in the administration of estates. And since the right to dispose of property by will is wholly dependent upon statutory enactment, in order to determine the validity of any will it is necessary to refer it to some particular statute. It is almost universally required that a will be in writing and signed by the testator or by a person in his presence and by his express direction and also that it be witnessed. The usual requirement as to witnesses is that a certain number attest and subscribe in the testator's presence.[1]

A careful distinction must be made between the words "attest" and "subscribe." To "attest" a will is "to know that it was published as such and to certify the facts required to constitute an actual and legal publication," [2] while "subscribe" means "to sign at the end." [3] As has been said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses; subscription is the act of the hand; the one mental, the other mechanical." [4] Attestation is the act of the mind in bearing witness to the signature and the subscription is the evidence of the previous attestation intended to preserve the proof of attestation in case of the witnesses' death.[5]

Clearly the simplest and best way to attest a signature is to see the testator actually write his name. This obviously satisfies the most rigid requirements and is uniformly held a good attestation.[6] It seems also sufficient if the testator signs his name some time previously and then shows it to the witnesses, acknowledging it to be his own. This slight laxity has been regarded of no consequence.[7]

Going a little further, it seems to be settled now that when the will is presented to witnesses, with the testator's signature plainly visible and acknowledged by him to be his will and the witnesses

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[14] Vaughn *v.* State, 130 Ala. 18, 30 South. 669. The court does not base its decisions on these grounds but it is obvious that these considerations apply.

[1] Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; 1 JARMAN, WILLS, 115.

[2] Swift *v.* Wiley, 40 Ky. 114.

[3] Coon *v.* Rigden, 4 Col. 275; Lawson *v.* Dawson's Estate, 21 Tex. Civ. App. 361, 53 S. W. 64.

[4] Dougherty *v.* Crandall, 168 Mich. 281, 134 N. W. 24.

[5] Chase *v.* Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687.

[6] 1 JARMAN, WILLS, 112.

[7] See Woodruff *v.* Hundley, 127 Ala. 640, 29 South. 98.

sign it, they are presumed to have sufficiently attested it,[8] and it has been held sufficient even when one witness denied seeing the signature, although it was plainly visible.[9]

Sometimes it happens that witnesses subscribe when the signature of the testator on account of folding or some other reason can not be seen. This brings up the question whether or not the courts will go a step further and hold this to be a sufficient attestation. In a recent case the testator asked the witnesses to sign his will but on account of folding no signature could be seen. It was held that the will was not duly attested. *Nunn* v. *Ehlert* (Mass.), 106 N. E. 163. This seems to follow the better rule. On principle it is hard to see how anyone can attest or bear witness to a signature which he neither sees nor has an opportunity to see. It is the testator's signature which the witnesses are required to attest and subscribe.[10] They may witness the instrument before the testator has signed but they can not witness it as a will because under the statutes it is not a will until it is signed by the testator. So it follows that there can be no proper attestation and subscription when the testator signs after the witnesses or when the signature though affixed can not be seen.[11] And the weight of authority supports this rule.[12] There is some conflict, however, some courts taking the ground that if the conduct of the testator indicated that he intended to acknowledge the paper as his will, this is sufficient, even though the witnesses neither saw him sign nor saw his signature.[13]

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[8] *In re* Higgins, 94 N. Y. 553; *In re* Look, 54 Hun. 635, 7 N. Y. Supp. 298.

[9] *In re* Look, *supra.*

[10] *Re* Abercrombie, 24 App. Div. 407, 48 N. Y. Supp. 414.

[11] Reed *v.* Watson, 27 Ind. 443.

[12] *In re* Will of Mackay, 110 N. Y. 611, 18 N. E. 433; Haack *v.* Tobin, 79 Minn. 101, 81 N. W. 758.

[13] *In re* Barry's Will, 219 Ill. 391, 76 N. E. 577; Dougherty *v.* Crandall, *supra.*